

Bal (Migration) [2021] AATA 1088 (15 April 2021)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Gurdeep Singh Bal

CASE NUMBER: 2000404

HOME AFFAIRS REFERENCE(S): BCC2019/1195953

MEMBER: Stephen Witts

DATE: 15 April 2021

PLACE OF DECISION: Melbourne

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DECISION: The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Statement made on 15 April 2021 at 11:53am

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – false or misleading information in visa application – previous student visa refusal not declared – claimed memory loss because of mental health and sleeping pills – psychologist’s report provided to department – credibility – no compassionate or compelling reasons justifying grant of visa provided to tribunal – decision under review affirmed

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 500.217, Schedule 4, criterion 4020(1), (5)

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 23 December 2019 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicant applied for the visa on 9 March 2019. The delegate refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate made a finding that the applicant had provided a bogus document or information that is false or misleading in a material particular in relation to the application for the visa.
7. The applicant appeared before the Tribunal on 15 April 2021 to give evidence and present arguments.
8. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
9. The applicant was represented in relation to the review by his registered migration agent.
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver

does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. According to the delegate's decision record dated 23 December 2019, provided to the Tribunal by the applicant, the applicant lodged a student visa application on 9 March 2019 answering "no" to the question as to whether he had ever had an application for entry or further stay in Australia or any other country refused or had a visa cancelled. According to the delegate departmental records indicated that on 20 October 2014 the applicant was refused a student TU-572 visa. According to the delegate the applicant when provided an opportunity to comment on suspected false information had provided a response stating that his personal situation at that time had affected his mental condition as a result of taking sleeping pills which lead to memory loss. According to the Department the applicant had claimed that he could not remember his previous visa refusal and then provided the wrong answer on the application. According to the delegate the applicant provided a report from a psychologist in regard to that matter. According to the delegate it assessed the material provided noting that the applicant had never declared that they were suffering from depression or any other health condition on the health declaration section of the application form and nor had the applicant ever declared that they had ever been diagnosed with any medical condition. According to the delegate it did not accept that the applicant was providing credible evidence in this regard and made a finding that the applicant purposely misled the department by declaring that he had not ever had an application for entry or further stay in Australia refused.
17. According to the delegate it also considered whether there were any grounds to justify the waiver of PIC 4020 and made a finding that there were not any such grounds.
18. The Tribunal has considered all the evidence before it including evidence provided to the Tribunal by the applicant prior to the hearing and to evidence given at hearing.
19. At the hearing the Tribunal had a discussion with the applicant regarding the circumstances of the visa refusal and the applicant's answer on the original application form on 9 March 2019 and his subsequent response. The applicant stated that he acknowledged that he had

made a mistake, that it was human error, and that he forgot about the previous refusal when he filled in the form and made his student visa application. He stated that he agreed that he had made an error but that he forgot because he was having a difficult time in his personal life during this period with his uncle suffering from depression and that he was also suffering from depression and that on that basis he forgot about the previous visa refusal. The Tribunal had a discussion with the applicant about this including about his previous evidence that he had been suffering depression and memory loss and that therefore forgot about relevant matters when filling in his form in making his application. He stated that he had first come to Australia in 2014 and had then returned on tourist visas and that then he decided he wanted to be a student here and acknowledged that he had made a mistake on his student visa application form.

20. The Tribunal has considered this matter carefully and notes that the applicant has acknowledged that he did provide false information in regard to his application here in Australia but that it was unintentional as he forgot about it. The Tribunal has considered this evidence carefully and does not find this evidence credible. The Tribunal notes that the applicant may have been going through a difficult time in his life reflecting on his uncle's illness back in his home country and that he may have been suffering from depression for a period of time with other health complications but that that does not obviate the applicant's responsibility to provide true and correct basic information on his visa application forms and through all his dealings with the Department. It is further noted by the Tribunal that the applicant has actually been here for a number of years having returned to his home country and then come back to Australia on different visas, so the applicant well knows the procedures and requirements for such activities.
21. As noted above the Tribunal has considered this matter carefully and finds that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, or a relevant assessing authority or a medical officer of the Commonwealth information that is false or misleading in a material particular as defined in PIC 4020(5) and that this information was false and misleading at the time it was given in relation to the visa application.
22. Therefore, the applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

23. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
24. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
25. For the following reasons, the Tribunal is not satisfied that the requirements should be waived.
26. At the hearing, the Tribunal had a discussion with applicant whether there were any compelling circumstances that affect the interests of Australia, or any compassionate or

compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen that justify the granting of the visa.

27. The applicant stated that there were no such circumstances or evidence that he wished to provide and that he had been here for a number of years now and wished for his visa situation to be resolved.
28. The Tribunal has considered this matter carefully and finds that the applicant has not put any evidence that there were any such circumstances in this case.
29. Therefore, the requirements of PIC 4020(1) or (2) should not be waived.
30. Concluding paragraphs
31. On the basis of the above, the applicant does not satisfy PIC 4020 for the purposes of cl 500.217.
32. The Tribunal finds that the applicant does not meet the criteria for any other subclass within the class of visa sought.

DECISION

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34. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Stephen Witts
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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